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In the Supreme Court of the United States

OCTOBER TERM, 1994

BURNS P. AND MARJORIE DOWNEY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

3 pp

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Petitioner correctly notes (Pet. I, 5-6) that this case presents the same question that is presented in *Commissioner* v. *Schleier*, cert. granted, No. 94-500. That question is whether back pay and liquidated damages received under the Age Discrimination in Employment Act are excluded from gross income under Section 104(a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness" (26 U.S.C. 104(a)(2)). That same question is also presented in *Commissioner* v. *Schmitz*, petition for cert. pending, No. 94-944.*

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* In *Commissioner* v. *Schmitz*, the government has suggested that the Court hold the petition and dispose of it as appropriate in light of the Court's disposition of *Commissioner* v. *Schleier*.

In this case, the Seventh Circuit concluded that back pay and liquidated damages under the Age Discrimination in Employment Act are not excluded from income under Section 104(a)(2). In *Commissioner* v. *Schleier* and *Commissioner* v. *Schmitz*, the Fifth and Ninth Circuits reached the opposite conclusion in cases arising out of the same instance of age discrimination by the same employer.

These cases present the identical question of law in identical factual scenarios. On or before December 29, 1994, the government will file its opening brief in *Commissioner* v. *Schleier*. Petitioner in the present case is, of course, free to seek the consent of the parties or this Court's leave to file an *amicus* brief in support of the respondent in *Commissioner* v. *Schleier* pursuant to Rule 37 of the Rules of this Court. There is thus no need or basis for consolidating the *Schleier* case with the present case. Consolidation would only delay and complicate the briefing schedule.

The petition for a writ of certiorari in the present case should therefore be held and disposed of as appropriate in light of the Court's disposition of *Commissioner* v. *Schleier*.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DECEMBER 1994